STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-V-

KENNETH JAY HOULIHAN

Defendant-Appellant, DK/

Supreme Court
No.
Court of Appeals
No. 256534
Lower Court
No. 01-2731, ~~1-2733~~

Kent
D. Leiter

Kent County Prosecutors Office
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* DEFENDANTS MCR 6.502 PRO-PER *

* * APPLICATION FOR RELIEF FROM JUDGMENT * *

PROOF OF SERVICE

AFFIDAVIT OF INDIGENCE

* * * SWORN AFFIDAVIT * * *

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellee -V- KENNETH JAY HOULIHAN Defendant-Appellant,	Supreme Court No. Court of Appeals No. 256534 Lower Court No. 1-2731, 1-2733

* DEFENDANTS MCR 6.502 PRO-PER *

* * APPLICATION FOR RELIEF FROM JUDGMENT * *

NOW COMES THE Defendant, who would ask upon this Honorable Court to hear defendant MCR 6.502 Pro-Per Brief on Appeal. Defendant files this application and Brief in Support in a timely manner under MCR 7.302(C)(3). Defendant now says;

1). Defendant pleaded guilty to two counts of Criminal Sexual Conduct in the first degree on the 24th day of April 2001, in front of the Honorable Dennis Leiber, in the Circuit Court for the County of Kent.

2). Defendant was sentence to a term of 20 to 40 years imprisonment, on the 5th day of July 2001, and is currently incarcerated at Saginaw Correctional Facility.

3). Defendant submitted a timely request for appointment of appellate counsel on or about the 10th day of July 2001, and was denied appointment of counsel on the 25th day of July 2001.

4). Defendant filed in pro-per, on issue to the Michigan Court of Appeals on July 1,2002 (See COA No.242342). This issue concerned appointment of appellate counsel. This issue was denied on January 3,2003. At the time of this filing, Bulger v Curtis, (Case No. 00-10476-BC) had not been ruled on by the United States District Court of Eastern Michigan, Dated July 16,2004.

5). Defendant filed a timely Motion and Brief to the Michigan Supreme Court on January 17,2003, over this same issue (See SC-No. 123313A), and was denied on September 19,2003. Justice Cavanagh and Kelly would have Remand.

6). On December 15,2003 defendant filed two issues for relief from judgment under MCR 6.502. This was denied on May 27,2004.

7). Defendant then filed with the Michigan Court of Appeals his MCR 6.502 Motion and Brief in Support. The Clerk of the Court on July 8,2004 sent a request for copies of defendant Lower Court Order as to case no. 01-2733. Defendant wrote to the Lower Court and received said Order and sent it unto the Clerk of the Court of Appeals, a Mr. Tom Rasdale. Mr. Rasdale would not accept the Order sent by the Lower Court (See Appendix 2). On or about February 1,2005, Mr. Rasdale informed defendant that the Court of Appeal would not hear the issue dealing with Case No. 01-2733 since defendant could not supply this allege Order, other than the documents that the Lower Court provided (See App.2).

8). On July 16,2004 the United States District Court for Eastern Michigan, came back in there decision in Bulger v Curtis, in Ordering the States of Michigan to appoint appellate counsel to a defendant that is first indigent, and second, pleaded guilty, which under Ross v Moffitt, 417 U.S. 600 (1974), the Michigan Courts had intrepided incorrectly.

9). Defendant filed a Motion to the Michigan Court of Appeals requesting the Clerk of the Court to pull his brief from the Court of Appeals so that he could file a 'Retroactive Change in the Law' under MCR 6.502(G)(2) back to the Lower Court.

10). The Clerk of the Court submitted the Brief to the Court of Appeal and would not 'Stay' the Brief, so defendant could file said motion and Brief in Support, as to the Bulger issue.

11). Defendant was denied by the Michigan Court of Appeal on February 10,2005. Defendant now submits these two issue to this Court for is review (See App.3).

WHEREAS, Defendant now submits these two issue to this Honorable Court for it opinion and humbly ask for a Remand as to the issues presented. Defendant also ask that this Court Remand defendant back to the Lower Court for appointment of counsel as was Order in Bulger v Curtis, and as Justice

Cavanagh and Kelly would have Remand for when defendant filed his Application for leave to Appeal on January 17,2003.

* SWORN AFFIDAVIT *

I, Kenneth J. Houlihan, do hereby swear that the laws and facts stated in defendant Application for Relief from Judgment and Brief in Support, to be true to the best of my knowledge and belief.

Respectfully submitted,

Date; 3-22-05

Kenneth Houlihan

Subscribed and sworn to before me this_____day of_____,2005.

_____

Notary Public.....

Subscribed and sworn before me, this 22nd day of March 2005 a Notary Public in and for Saginaw County, State of Michigan

Arthur J. Volare

(Signature)

NOTARY PUBLIC

My Commission Expires 8/26/2011

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellee, -V- KENNETH JAY HOULIHAN Defendant-Appellant,	)	Supreme Court No. Court of Appeals No. 256534 Lower Court No. 1-2731, 1-2733

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* **DEFENDANTS MCR 6.502 PRO-PER** *

* * **BRIEF ON APPEAL** * *

PROOF OF SERVICE

SWORN AFFIDAVIT

* * * **REQUEST FOR ORAL ARGUMENTS** * * *

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellee, -V- KENNETH JAY HOULIHAN Defendant-Appellant,	Supreme Court No. Court of Appeals No. 256534 Lower Court No. 1-2731, 1-2733

* * **PROOF OF SERVICE** * *

State of Michigan)
§§
County of Saginaw)

I, Kenneth Jay Houlihan, being first duly sworn, state that on the 28 day of March, 2005. I served unto;

Kent County Prosecutors Office
Attorney for the Plaintiff
Criminal Appellate Division
82 Ionia NW, Suite 450
Grand Rapids, Michigan 49503

A copy of "Defendant's MCR 6.502 Pro-Per Brief on Appeal", by mailing the same to them, in a sealed envelope, addressed with postage fully prepaid theron, and by depositing the same in the United States mail in Freeland, Michigan 48623.

Respectfully submitted,

Kenneth J. Houlihan

Kenneth J. Houlihan

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CONSTITUTIONS

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MICHIGAN COURT RULES

* STATEMENT OF QUESTION INVOLVED *

I.

Did Attorney John P. Pyrski state to defendant that there was a sentencing agreement between the defense and the prosecution prior to sentencing?

Defendant - Appellant answers 'Yes' to this question.

Plaintiff - Appellee answers 'No' to this question.

II.

Did the trial court error in its failure to expose the perjured sworn affidavit of the alleged victim prior to defendant sentencing?

Defendant - Appellant answers 'Yes' to this question.

Plaintiff - Appellee answers 'No' to this question.

* COURT JURISDICTION *

Defendant filed his MCR 6.502 Motion for Relief from Judgment in the trial court and was denied on May 27, 2004. Defendant then filed his MCR 6.502 Motion and Brief in Support in a timely manner to the Michigan Court of Appeal, and was denied on February 10, 2005. - Under MCR 7.302(C)(3), defendant now files his timely MCR 6.502 Motion and Brief in Support to this Court. This Court has jurisdiction under MCR 7.301(A)(2).

STATEMENT OF FACTS

Defendant Houlihan was represented by attorney John P. Pyrski through out his entire criminal process. At the time of defendants preliminary examination, attorney Pyrski had talk to defendant while he was lock in a waiting area of the court about a plea-agreement that he was working on with the prosecution. This deal consisted of defendant waiving this preliminary examination, in return, the prosecution would have the trial court give defendant a specified sentence. This specified sentence would be 'No more' than 8 to 10 years on defendants minimum.

Defendant agreed with defense attorney Pyrski that maybe this was the best thing for defendant to do. From the beginning till the time of sentencing, defendant Houlihan believed that a 'working agreement' was in place for him to plead guilty in exchange for this guarantee sentence of 8 to 10 years.

At defendant sentencing, attorney Pyrski stood just behind defendant. Defendant was told prior to sentencing by attorney Pyrski that he could not say anything about this agreement between the defense and the prosecution, because the father of this alleged victim was in the court room and the trial court did not wish the father to have any knowledge of this agreement.

Attorney Pyrski told defendant to act remorseful and if defendant had problems with any of the questions by the trial court, attorney Pyrski would assist him through them. At key points in the questioning by the trial court attorney Pyrski lean over defendants shoulder and told him to answer as attorney Pyrski told him to. When the trial court gave defendant his sentence, it was as if defendant was in a state of shock and assumed that after this alleged victims father left the court room, defendant would be called back into the trial court to received the agreed sentence.

Defendant was sentence to the state prison and was also denied appointment of appellate counsel by the trial court. Defendant Houlihan is

of average intelligence and work as a Zoo car-taker in his civilian career.

Defendant has had very little dealings with the criminal justice system and had no working knowledge in the criminal law process. He was very much dependent on the hustlers that convince incoming inmates of there need to proceed in there appellate rights and provide very little skill in helping these incoming inmates in pursuing that right. This was more that pointed out by Supreme Court Justice Michael F. Cavanagh and the Honorable Marilyn Kelly in there decenting opinions, in the denial of defendant application for leave to appeal dated September 19,2003.

On or about September 22,2004, the Michigan Court of Appeals requested defendant to send them five copies of defendant circuit court order for case no 01-2733. Defendant sent unto the trial court for a copy of said Order and was sent the copies presented in (App. 2). Defendant submitted this documentation upon the Michigan Court of Appeals Three (3) times, and yet the Michigan Court of Appeals refused to accept this documentation and denied defendant the right to present this issues to said Court. Defendant should not be denied the right to present this issue in regards to case no. 01-2733 solely because the trial court did not send, or would not send the proper documentation required by the Court of Appeals. Defendant has no control over what documentation, that is released by the trial court clerk.

Defendant now submits both case number 01-2731 and 01-2733 to this court for its consideration and ask that it renders relief in this matter, and orders this matter back to the trial court for a setting aside of defendants plea of guilty and a new trial.

ISSUE ONE

ATTORNEY JOHN P. PYRSKI MADE PROMISES OF A SENTENCING AGREEMENT BETWEEN THE DEFENSE AND THE PROSECUTION, AT DEFENDANT PRELIMINARY EXAMINATION IN EXCHANGE FOR A PLEA OF GUILTY, VIOLATING DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review;

"A district court may not deny a § 2255 motion without a hearing [u]nless the motion and the files and records of the case conclusively shows that the prisoner is entitle to no relief." Marrow v United States, 772 F.2d 525, 526 (9th Cir. 1985).

"The United States Supreme Court has held that 'A guilty plea, if induced by promises or threats which deprive it of character of a voluntary act, is void.'" Machibroda v United States, 368 U.S. 493, 82 SCt 510, 7 LEd2d 473 (1962).

* *

Defendant now brings unto this Honorable Court, that a plea agreement was agreed to between the prosecution and the defense counsel at the time of defendant district court hearing. This agreement, as stated to defendant by attorney Pyrski, in essence consisted in that defendant minimum sentence would be no less than 8 years and no more than 10 years. - That all defendant had to do at the plea arraignment - when question by the judge as to if any promises had been made, is to answer no, otherwise there could be no deal.

In United States v McCarthy, 433 F.2d 591 (1st Cir. 1970) the court moved to have McCarthy sentence void on the promised of a suspended sentence in return for his guilty plea. In the case of United States v Pallotta, 433 F.2d 595 (1970) defendant merely alleged that the prosecution promised to recommed a lesser sentence and failed to honor that. In this case, defense counsel stated to defendant Houlihan that the prosecution had the

authority to promise such a sentence on behalf of the courts and all defendant had to do was, lie or perjured himself by answering 'No' to any questions by the judge as to 'any promises made'.

This plea agreement based on the promise of a guaranteed sentence is exactly what was brought in Mcaleney v United States, 539 F.2d 282 (1976);

> "The courts ruled, however, that the issue was "not what Mr. Collora (the prosecutor) said; it is what (Mcaleney) own attorney MacKay said to him as a result of discussions he had with Assistance United States Attorney". The court concluded, "when McAleney change his plea he did so on the basis that he assumed the Government would be recommending a three-year sentence of imprisonment in his case to Judge Caffrey". On the basis that McAleney was induced to plead as the result of his attorney's advice that a promise had been made, the court allowed the motion to vacate. Id. at 283.

The difference between the McCarthy case and Pallotta case can be shown in this respect as to the effect of a promise on a pleaded sentencing conveyed to defendant by his attorney.

> 'A mere prediction by counsel of the court's likely attitude on sentence, short of some implication of an agreement or understanding, is not grounds for attacking a plea'. Domenica v United States, 292 F.2d 483, 485 (1st Cir. 1961). Here, however, defendant alleges that his counsel purported to speak on behalf of the United States Attorney; that 'a working agreement' had been formulated by the defense counsel and the United States Attorney and that said agreement was breached and disavowed by both parties concerned." See Machibroda v United States, 368 U.S. 487, 489, 82 SCt 510, 7 LEd2d 473 (1962).

In this case, defendant Houlihan knew that there was an on going 'working agreement' between his counsel and the prosecution and just assumed that this was part of said 'working agreement'. But even if such a working agreement did not existed beyond the scope of what was testified to at the plea hearing, it did not matter, since defendant Houlihan based his decision on the belief that defense counsel had made such an agreement.

"Even if no 'working agreement existed in fact, the voluntariness

> of defendant's guilty plea would be seriously in question if it was induced by representation by court-appointed counsel that such an agreement was in effect." See United States ex rel. Thurmond v Mancusi, 275 F.Supp. 508 (E.D.N.Y. 1967).

The basis of this plea by defendant Houlihan was not on leniency. Defendant pleaded guilty to two counts of CSC-1 which carried any number of years up to life. What leniency could defendant expect, 30 or 40 years to life? At defendant age of 36, it would be consider a death sentence. This plea of defendants was to a specific number of years, as promise by his counsel with what defendant Houlihan believed was on behalf of the prosecution.

> "The government contends that the defendant is not entitled to a hearing because his allegation are conclusory and lack specificity." Macon v United States, 414 F.2d 1290 (9th Cir. 1969). But in Macon the defendant alleged merely that he had pleaded guilty because he believed "he would be treated with leniency.' Inasmuch as this defendant has alleged a promise of a specific sentence made by a named offical, his motion cannot be said to be "vague, conclusory, or palpably incredible." Machibroda, Supra, Id. at 487, 495.

Generally speaking, the courts have overturned guilty pleas only where defendants have shown that promises of leniency were made by the courts or that they believed promises made by the prosecution to be binding on the court, as defendant Houlihan believed when his counsel stated to him that, an agreement between defense counsel and the prosecution to a specific number of years would be given to him, if he pleaded guilty. See Trimier v United States, 295 F.2d 237 (8th Cir. 1961); Shelton v United States, 246 F.2d 571, 572 n. 2 (5th Cir. 1957), rev'd on other grounds, 356 U.S. 26, 78 SCt 563, 2 LEd2d 579 (1958).

> "A sentence based on a guilty plea that was induced by reliance on an unfulfilled prosecution promise is void." United States v Paglia, 190 F.2d 445, 448 (2nd Cir. 1951), overruled on other grounds, United States v Taylor, 217 F.2d 397 (2nd Cir. 1954), whether a defendant's guilty plea was induced by an unfulfilled prosecution promise is a question of fact to be resolved at an evidentiary hearing. Paglia, supra. at 447.

The prosecution may argue that, because defendant had a hearing in which he could have mention this plea agreement, and that he stated that he had received no promises in return for his guilty plea, the courts are entitled to dispose of his motion on the basis of the files and records of the case. But as in Machibroda Supra, the factual allegations contained in defendants motion and affidavit - related primarily to purported occurrences outside of the courtroom, upon which the record could, therefore cast no real light. Id at 494,495.

It is true that in Machibroda there had been no inquiry as to any deal, but as defendant Houlihan wishes to point out, in cases which a guilty plea has been improperly induced, most defendants would be expected to deny any impropriety during any plea-bargain hearing, see Machibroda, Id at 494, 495. It is for this reason that the courts have generally concluded that the record is "evidential on the issue of voluntariness - not conclusive." United States ex rel. McGarth v LaVallee, 319 F.2d 308, 314 (2d Cir. 1963). Accord Jones v United States, 384 F.2d 916 (9th Cir. 1967); Trotter v United States, 359 F.2d 419 (2d Cir. 1966); Scott v United States, 349 F.2d 641 (6th Cir. 1965).

This was argued by the government in McAleney v United States, Id at 285, and the courts took this position in there view;

> 'The Government strongest argument is that a Rule 11 hearing took place during which McAleney, with MacKay (defense counsel) at his side, responded "No" to questions whether anyone coerced or pressured him to plead, whether anyone made promises or extenuating inducement", and whether "any plea bargaining [took] place". - We said in McCarthy, however, that most defendants could be expected to deny "any impropriety" during the Rule 11 hearing, 433 F.2d at 593 & n.3, and we cannot now say that it would be obvious to a poorly counselled defendant that he should mention a supposed "deal" with the Government.'

In the case at bar, the trial court knew that a plea-bargaining had been taking place since the time of the preliminary examination and this was the reason that defendant waived his examination because of this sentencing

agreement that attorney Pyrski told defendant Houlihan that he had a secured working agreement with the prosecution. This agreement was for a minimum between 8 to 10 years. Defendant waived the preliminary examination due to this agreement and just before sentencing, attorney Pyski told defendant to answer as he told him to. - Attorney Pyrski said that there could be no mention of any agreement because, the alleged victim father, was in the court room and he had no knowledge of this agreement and that the courts wish him to have no knowledge of it. If this court will review the testimony in the impact statement by Mr. Monte Palmer, the alleged victims father (See sentencing T.T. Pg-7,8,9), it may understand the importance of the appearance of 'No' leniency by the courts in any plea-bargain agreement.

> "I also understand that this court system -- our judicial system has a point system for sentencing people, and it's my understanding that this man will get 20 years -- 22 years in prison to life, but he'll walk out of prison in 20 years."

Attorney Pyrski clearly had 'No' agreement with the prosecution and mislead defendant to secure this plea of guilty, in direct violation of defendant's Sixth Amendment Right to effective assistance of counsel.

THEREFORE, defendant ask upon this Honorable Court for a 'Remand' or at the very least an 'Evidentiary Hearing' in this matter as stated under United States v Paglia, Supra, Id. at 447, into the promises made by defense counsel attorney John P. Pyrski in securing this plea of guilty.

ISSUE TWO

THE TRIAL COURT ERRED IN IT'S FAILURE TO EXPOSE THE FRAUD, IN THE AFFIDAVIT OF THE ALLEGED VICTIMS IMPACT STATEMENT UNDER MCL 750.426, THUS DENYING DEFENDANT HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT AS TO EQUAL PROTECTION OF THE LAW.

Standard of Review:

> False Evidence, 'known to be such by representatives of the state, must fall under the due process clause of the Fourteenth Amendment; the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.' Napue v Illinois, 360 US 264, 3 LEd2d 1217, 79 SCt 1173 (1959).

* *

This issue of fraud in the affidavit of the allege victim Impact Statement, was preserved by trial counsel attorney John P. Pyrski at defendant sentencing hearing on July 5,2001.

Attorney Pyrski indicated for the record that the alleged victim in this matter a Drew Palmer, was to alleged to have submitted a Victim Impact Statement to the court and was part of the information used in the sentencing recommendation by the probation department in there pre-sentencing review.

This letter or affidavit was sent to attorney Pyrski by the court clerk before sentencing (See App.1). Along with this affidavit of Drew Palmer, was a second letter by the father of the alleged victim Monte Palmer, who also gave testimony at this hearing (See App.2). Attorney Pyrski brought to the courts attention that both affidavit's were in the same hand writing and that the hand writing in Drew Palmer affidavit appeared to be that of his father Monte Palmer with only the signature being that of Drew Palmer. By the Honorable Judge Dennis B. Leiber acceptance of this questionable affidavit without any

investigation or hearing as to the authenticity of this affidavit was a clear violation of MCR 750. 426;

> Proceeding when court reasonable believes Perjury has been committed, - Whenever it shall appear to any court of record that any witness or party who has been legally sworn and exmined or has made an affidavit in any proceeding in a court of justice, has testified in such a manner as to induce a reasonable presumption that he has been guilty of perjury therein, the court may immediately commit such witness or party, by an order or process for that purpose, or may take a recognizance with sureties, for his appearing to answer to an indictment for perjury; and thereupon the witness to establish such perjury may, if present, be bound over to the proper court, and notice of the proceedings shall forthwith be given to the prosecuting attorney.

By allowing this affidavit to enter the record and be used as part of the sentencing process, prejudice defendant Houlihan. It was believed by defendant and stated by defense attorney Pyrski, that Drew Palmer, the alleged victim in this matter, wanted leniency for defendant Houlihan, (See App. 2).

In the Honorable judge's failure to hold any proceeding into the authenticity of this affidavit, he allowed the alleged victim father Monte Palmer to perpetrate this fraud under MCR 750.424 in the procuring of this perjured Victim Impact Statement;

> Subornation or perjury;
>
> Any person who shall be guilty of subornation of perjury, by procuring another person to commit the crime of perjury, shall be punished as provided in the next preceding section.
>
> MCL 750.425;
>
> Any person who shall endeavor to incite or procure any person to commit the crime of perjury, though no perjury be committed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years.

Under MCL 780.763(c), the victim has a right to make any written or oral statement to be used in preparation of a presentence investigation report. It is clear that if the alleged victim wanted leniency for defendant Houlihan,

he was denied this right, by the trial courts acceptance of this forcible signed perjured affidavit, drafted by the father Mr. Monte Palmer. The views in this statement, were that of the father not the alleged victim and a hearing should have been held, once it became known that this fraud was being committed upon the trial court.

If Drew Palmer was a victim in the true since of the word, he should have had his feeling known, not that of the father, who had his chance at the sentencing hearing. MCL 780.764 clearly states;

> Sec. 14. The victim has the 'Right' to submit or make written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant.

The prejudice done to defendant Houlihan can be seen in the impact statement its self. If the trial court would have called on Drew Palmer to draft a new and guarded impact statement, they may have seen that the alleged victim was not a damage victim as the father insisted he was and thus gave defendant Houlihan a lesser sentence. This failure by the trial court denied defendant Houlihan the rudimentary demands of fair procedure as state in Davis v United States, 94 SCt 2298; 417 U.S. 333; 41 LEd2d 109 (1974) and equal protection under the law as guarantee under the Fourteenth Amendment.

Under the Michigan Code of Judicial Conduct, in Canon 2 (B), it lays the foundation as to the judge's responsibility in this matter;

> 'A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.

The trial judge knew that a fraud was possible being perpetrated upon the court and chose to look the other way, to keep from investigating the father Monte Palmer, who's personal vendetta was camouflaged through his son victim impact statement.

The United States Supreme Court has set down limits as to what will not be interfered with by the appellate court's. In there decision based on Slocum, supra, they made it clear;

> "A sentence imposed by a district court within statutory limits, and is not illegal, or based on 'inaccurate information' or procedures that offends due process will not be interfered with on appeal." United States v Slocum, 695 F.2d 650, 657 (2d Cir. 1982).

'Inaccurate information' - There can be no doubt that attorney John Pyrski and defendant Houlihan knew of this inaccurate information and one would suspect, (since it was preserved on the record) that the trial court judge and the prosecution knew of it to. This establishes the cause under 'offends due process' as stated in Slocum, supra, Id. at 657. But the U.S. Supreme Court sat down Four factors that they ruled as mandatory in any sentencing;

> "What process is due at sentencing must be evaluated in light of four factors; (1). the nature of the individual interest, (2). the risk of error inherent in present methods of obtaining information, (3) the value of additional procedural safeguard, and (4). the government's interest, including fiscal burdens, of any proposed additional safeguards." Mathews v Eldridge, 424 U.S. 319, 335; 96 SCt 893, 903; 47 LEd2d 18 (1976).

There was a clear need for a safeguard in this manufacture perjured affidavit of the alleged victim Drew Palmer. If Drew Palmer was to be allowed to submit his own Victim Impact Statement, the courts surly would have seen the relationship of the alleged victim and defendant in a much different light and this light most surly would have been reflected in the trial courts sentencing procedures. There can be no doubt as to defendant right in bring this issue since it was preserved and is stated by the U.S. Supreme Court;

> "Further, the Supreme Court instructs us that a defendant has a due process right to question the procedure leading to the imposition of his sentence." Gardner v Florida, 430 U.S. 349, 358; 97 SCt 1197, 1204; 51 LEd2d 393 (1977).

When this alleged victims father Mr. Monte Palmer gave his statement at the time of defendant Houlihans sentencing, the trial court failed to even ask the question of Mr. Palmer as to who drafted this affidavit to see if a fraud was being perpetrated upon the courts. - Talk about not wanting to expose a fraud. This can only be consider a clear case of, denial of Equal protection under the Fourteenth Amendment and a total miscarriage of justice as stated in United States v Delo, 115 Sct 851; 513 U.S. 298; 130 LEd2d 808 (1995), and a denial of the rudimentary demands of fair procedure, see Davis v United States, 94 SCt 2298; 417 U.S. 333; 41 LEd2d 109 (1974).

Defendant Houlihan was prejudice by the trial courts failure to expose this perjured affidavit, that was used in his sentencing and denied equal protection of the law under his Fourteenth Amendment Constitutional Rights.

THEREFORE, defendant now ask upon this Honorable Court, to remand him back to the trial court for an evidentiary hearing and re-sentencing due to the trial courts failure to expose this fraud in the sworn affidavit of the alleged victim, Drew Palmer, perpetrated by his father Monte Palmer.

DEFENDANT'S RESPONSE TO GOOD CAUSE AND ACTUAL PREJUDICE.

* GOOD CAUSE *

Although subchapter MCR 6.500 has been in effect for over fifteen years, our Michigan Appellate courts have never given the term 'good cause' a precise meaning, People v Reed, 198 Mich App 639; 499 NW2d 441 (1993), Id. at 383. However, the commentary to MCR 6.505 (which was relied on in Reed), states that the 'cause and prejudice' standard is based on the United States Supreme Court decision in Wainwright v Sykes, 97 SCt 2497; 433 U.S. 72; 53 LEd2d 594 (1977); and United States v Frady, 102 SCt 1584; 456 U.S. 152; 71 LEd2d 816 (1982). Under those decisions, a federal court will not review a prisoner's claim that the court has found procedurally defaulted unless the prisoner can demonstrate cause and prejudice, Wainwright, Supra.

In People v Reed, Supra, the Michigan Supreme Court agreed that 'Cause' can be established by proving Ineffective Assistance of Appellate Counsel pursuant to the standards set forth in Strickland v Washington, Supra. "Defendant may file a motion for relief from judgment pursuant to MCR 6.500 and argued that his first appellate attorney neglect of the appeal of right established the required 'good cause' for failure to raise his current appellate issues in that appeal of right', People v Hardaway, No. 110824; 459 Mich 876 (1999). A petitioner is permitted to assert ineffective assistance of counsel as cause, Carpenter v Mohr, 163 F.3d 938, 945 (MI. 6th Cir. 1998).

In addition, the United States Supreme Court observed that the 'Cause' requirement may be waived where there is a 'fundamental miscarriage of justice', United States v Delo, 115 SCt 851; 513 U.S. 298; 130 LEd2d 808 (1995).

In order to establish a denial of ineffective assistance of counsel guaranteed under the state and federal constitution, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney, as guaranteed by the Sixth Amendment. - Moreover, the defendant must overcome the presumption that the challenged action was sound trial strategy, and the deficiency must be prejudicial to the defendant, People v Tommolino, 187 Mich App. 14; 466 NW2d 315 (1991); People v Reed, Supra, Id at 390. The same standards apply to a claim of ineffective assistance of appellate counsel, People v Reed, 198 Mich App. 639; 499 NW2d 441 (1993); People v Hurst, 205 Mich App. 634; 517 NW2d 858 (1994).

In the case at bar, defendant Houlihan believed in attorney Pyrski ability to secure a number year sentence as he claimed to defendant in this working agreement. Defendant had no appellate counsel to bring this issue before the appellate courts and did not have the working ability in the law to understand that attorney Pyrski had violated his Sixth Amendment rights till long after he filed his application for leave to appeal. Defendant Houlihan had to depend on these so called jail house lawyers to prepare his appeal, that was not only denied by the Michigan Court of Appeals, but the Michigan Supreme Court.

Defendant only now understands that a fundamental miscarriage of justice was perpetrated upon him by defense counsel Pyrski, in this factitious working agreement with the prosecution. Attorney Pyrski motive was to get defendant to waive defendant preliminary examination so that the prosecution would not have to put this alleged victim on the stand - or if a working agreement did exist at the time of the preliminary examination, it fell through long before defendant's sentencing and attorney Pyrski still led defendant to believe that

such an agreement was still in force.

This in itself meets the standard under United States v Delo, Supra. Defendant pursued his application for leave to appeal on the grounds for appointment of appellate counsel. If defendant had the knowledge to perfect an appeal there would have been no need for that issue.

> "the courts may waive the 'good cause' requirement if it determines that the claim asserted constituted 'a fundamental defect which inherently results in a complete miscarriage of justice' or if the party asserting the claim did not receive 'the rudimentary demands of fair procedure,'" Davis v United states, 94 SCt 2289; 417 U.S. 333; 41 LEd2d 109 (1974).

In issue One, there can be no doubt that not only was the rudimentary demands of fair procedure denied defendant Houlihan in his attorney ineffective assistance of counsel as to the alleged manufacturing of this plea-bargain agreement, - but also in the trial court acceptance of the alleged victim perjured impact statement, as stated in Issue Two. Issue Two was a clear jurisdictional defect in the trial courts failure to investigate as to who drafted this affidavit and was a fraud being committed.

> It is clear that, by its own terms, the 'good cause' and 'actual prejudice' prerequisites of MCR 6.508 (D)(3) need not be satisfied where a defendant properly alleges a jurisdictional defect in a prior proceeding that resulted in a conviction and sentence. It is also apparent that MCR 6.508 - which articulates the proceedings for obtaining post-appeal relief - permits jurisdictionally based challenges to be raised after a criminal appeal has been exhausted. (emphasis in the original) People v Carpentier, 446 Mich 19; 521 NW2d 195 (1994).

The trial court was more concern with passing on to defendant Houlihan his sentence than if it was being used as a means of vengeance by the father of this alleged victim, which was extremely prejudicial to defendant Houlihan sentencing process. This more than satisfies the prerequisites under MCR 6.508 (D)(3).

Defendant's ignorance in his ability to perfect these two issues should

not be held against him from now bringing these two clearly prejudicial issues to this court.

* * ACTUAL PREJUDICE * *

The damage or prejudice done to defendant Houlihan in attorney Pyrski failure to explain to defendant that there was 'No working Agreement' or agreement for a number year sentence can be seen in the sentence itself. If defendant would have known at the time of the preliminary examination that no agreement was in force, he could have had his preliminary examination and could have examine the alleged victim under oath, thus giving Drew Palmer a chance to explain to the courts as to the elements surrounding this alleged crime of CSC-1.

This in itself would have denied Monte Palmer the chance to fraud the court as stated in issue two. The alleged victim would have had his chance to explain that, this was not a case of a older man praying on a child, but a relationship of respect. Through Mr. Monte Palmer perjury of his son affidavit and his hate out of his own hurt as the boy father, he was able to convince the court that it was a sham that defendant could not be put away for life.

These two errors prejudice defendant Houlihan in his rights under the Sixth and Fourteenth Amendments. Ineffective assistance of counsel denied defendant the right of trial and the trial court error in failing to expose the Fraud perpetrated by the father Monte Palmer in Drew Palmer sworn affidavit denied or prejudice defendant Houlihan in a more just and appropriate sentence under the law, thus denying defendant equal protection under the law.

Defendant Houlihan has met the standards for 'Cause and Prejudice' under Wainwright v Sykes, supra, and United States v Frady, supra, and had clearly shown the fundamental miscarriage of justice as stated under United States v Delo, supra,. Defendant was prejudice by these to clearly constitutional

issues and has shown that a miscarriage of justice would be committed by this court to allow this conviction to stand.

B B RELIEF REQUESTED B B

WHEREFORE, defendant now ask upon this Honorable Court, to accept this defendants Pro-Per MCR 6.502 Brief under MCR 7.302, and allow it to be heard by this Court. Defendant ask that this Court 'Grant' defendant a Remand back to the trial court for trial, or at the very least, an 'Evidentiary Hearing' as to the issues presented. Defendant ask for 'Oral Arguments' in this matter to more fully explain how this plea of guilty was solicited from defendant, and the purpose of the manufacture impact statement, and how it was used to Prejudice defendant at sentencing.

B B SWORN AFFIDAVIT B B

I, Kenneth J. Houlihan, due hereby swear that the facts and laws stated in this MCR 6.502 brief to be true to the best of my knowledge and belief.

Respectfully submitted,

Date: 3-28-05

Kenneth J. Houlihan

Kenneth J. Houlihan